

NO. 22731

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY L. WARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATUTE INVOLVED

Title 21, United States Code, Section 176(a), provides
in pertinent part as follows:

" . . . whoever, knowingly, with intent to
defraud the United States, . . . receives, conceals,
buys, sells, or in any manner facilitates the trans-
portation, or sale of such marihuana after being
imported or brought in, knowing the same to have
been imported or brought into the United States
contrary to law . . . shall be imprisoned not less
than five or more than twenty years and, in addition,

may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

II

STATEMENT OF THE CASE

On August 21, 1967, at approximately 11:00 p.m., Federal Narcotics Agent Lusardi met co-defendant Brooks Miser at Holmes and Slauson Streets in Los Angeles [R. T. 43, 48].^{1/} Agent Lusardi was accompanied by Federal Narcotics Agent Walker [R. T. 78]; also present was Thyron Mertz, an informant. Agents Lusardi and Walker, and Miser and Mertz then proceeded to 6513 Holmes Street in Los Angeles [R. T. 43, 54, 65, 78].

Agent Lusardi and Mr. Miser went to the resident at the above address and knocked on the door [R. T. 43, 55]. The door was opened by a man later identified as defendant Orlando Louis Duran [R. T. 43-44, 79]. Agent Lusardi was introduced to defendant Duran and defendant Terry Lawrence Ward. [R. T. 44, 57].

^{1/} "R. T." refers to Reporter's Transcript.

Mr. Miser then spoke directly to defendant Ward. It appeared to Agent Lusardi that Miser knew only defendant Ward or knew him better than defendant Duran [R. T. 65].

Agent Lusardi asked defendant Ward if he had the marihuana and if he was ready to do business. Defendant Ward stated he did have the marihuana and instructed Agent Lusardi to drive his car to the rear of the house so it could be loaded [R. T. 44, 57].

Agent Lusardi asked defendant Ward if it would be possible to see the marihuana before turning over the money [R. T. 44]. Agent Lusardi, defendants Ward and Duran, and Miser then went into the rear yard behind the house [R. T. 44-45, 57-58]. They approached Ward's 1967 Volkswagen parked in the rear yard [R. T. 44, 45, 67]. At defendant Duran's instruction defendant Ward unlocked the trunk whereupon agent Lusardi observed and examined a large number of kilograms of marihuana located inside [R. T. 45, 58, 66-67]. Defendant Duran asked the agent if he wanted to take a closer look at the marihuana and told him he could take 2 or 3 of the kilos into the house and look at them in the light [R. T. 45]. Lusardi advised him that the marihuana looked good and that he was satisfied [R. T. 45].

Agent Lusardi asked defendant Duran if there were 50 kilograms in the trunk. Duran stated there were 46 in the trunk and 14 more in the garage [R. T. 45-46]. Defendant Ward told Duran to open the garage and show the agent the other kilos [R. T. 46]. Defendant Duran told Lusardi that the kilos in the garage were wrapped differently because they had opened them up

to ascertain whether the marihuana had been either "sugared or honeyed down" [R. T. 46]. Defendant Duran then unlocked and opened the garage door [R. T. 46, 70]. In the garage Agent Lusardi examined a box containing approximately 14 kilograms of marihuana. He then told defendants Ward and Duran he was satisfied and would get his partner and load the marihuana into his vehicle [R. T. 46].

Agent Lusardi and Miser then returned to the government car. Agent Lusardi told Agent Walker he had seen the marihuana and told him to drive to the backyard. Agent Walker drove up the driveway where defendant Duran instructed him to back his car next to the Volkswagen and to shut off the lights of his vehicle [R. T. 79]. Agent Lusardi then placed Miser under arrest, while Agent Walker placed defendant Duran and defendant Ward under arrest [R. T. 47-48, 60-62, 79].

III

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT WARD WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT I OF THE INDICTMENT.

Section 176(a), Title 21, United States Code, provides that proof of possession of marihuana is sufficient evidence to authorized conviction unless that possession is explained to the satisfaction of the jury.

"Possession" sufficient to support the inference of importation and knowledge provided in Section 176(a) of Title 21, United States Code, means having marihuana under one's dominion and control to such a degree as to have the power of disposal. Such possession can be constructive and need not be exclusive, but may be joint.

Rodella v. United States, 286 F.2d 306, 311

(9 Cir. 1960), cert. den. 365 U.S. 889 (1961);

Dolliver v. United States, 379 F.2d 307

(9th Cir. 1967).

Actual or constructive possession may be proved by circumstantial evidence.

Cellino v. United States, 276 F.2d 941

(9th Cir. 1960).

There is no doubt that Agent Lusardi spoke to defendant Ward at the outset of the negotiations. Both on direct and cross-examination, Lusardi stated that he first discussed the impending transaction with Ward. During this discussion Ward stated that he had the marihuana and instructed Lusardi as to the procedure to be followed for the transfer of that marihuana [R. T. 44, 57]. Such conversation provides the trier of facts with competent circumstantial evidence of dominion and control.

Cellino, supra, at p. 947;

Dolliver, supra.

Moreover, the marihuana charged in Count I was in defendant Ward's car which he opened with his key in order to allow Lusardi

to inspect it. [R. T. 45, 47, 67]. As stated in Evans v. United States, 257 F.2d 121, 128 (9th Cir. 1958) cited in appellant's brief at p. 9:

"Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics and control thereof. "

Ward's dominion and control of the marihuana is shown by his negotiation for the transfer of the marihuana and by its presence in his vehicle. Use of his key was necessary to display the contraband. He had the ability to drive away with it if he so desired. However, his conversation with Lusardi at the outset of the transaction indicated that his desire was to sell the marihuana, which he clearly had both the intention and power to do. This dominion and control was such as to give him the power of disposal of the contraband and therefore constituted possession, either actual or constructive.

Rodella v. United States, supra, at 11. 311, 312;

Cellino v. United States, supra.

This case is distinguishable from the facts in both Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962) and Delgado v. United States, 327 F.2d 641 (9th Cir. 1962) cited in appellant's brief at pages 5 and 7. In Delgado there was no evidence presented other than the fact that marihuana was found

in the drawer of a nightstand at the foot of a bed occupied by the defendant and co-defendant. The defendant in Arrellanes was the wife of the co-defendant. Her presence where narcotics were found was coincidental with the presence of her husband and could be explained by her attachment to him. Her statement to the other passenger in the car concerning her "sitting on fifty pounds of weed" was made after arrest and after a disclosure of marihuana in the car had been made to everyone present.

Arrellanes, supra, at p. 606. Moreover, her husband had complete direction and control over the automobile where the contraband was found, indicating that he had exclusive possession of the hidden contents. *Id.* at p. 606.

B. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT WARD WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT II OF THE INDICTMENT.

Count II of the indictment involves the 14 kilograms of marihuana located in the garage [R. T. 47]. The evidence shows that Ward had joint constructive possession along with co-defendant Duran. The indictment, although stated in two counts, describes essentially one transaction. Defendant Ward conducted negotiations with the agent for the entire amount of marihuana. In the discussions defendant Ward at no time distinguished between the marihuana located in the garage and the marihuana in the trunk of the car.

While in the backyard with full knowledge of the presence of marihuana in the garage, Defendant Ward instructed Duran to open the garage door, the inference being that the sale could then be consummated. Duran complied with this direction. The negotiations, coupled with the order to display the 14 kilograms in the garage, show that Ward had both the intent and the power to jointly dispose of this marihuana with Duran, and therefore that he was in constructive possession of it. At least reasonable minds could, and did, so conclude.

Klepper v. United States, 331 F.2d 694

(9th Cir. 1964);

Rodella, supra, at p. 311;

Cellino, supra.

CONCLUSION

From the foregoing facts it can be seen that there was ample evidence, taking the view most favorable to the government, for reasonable minds to conclude that defendant was in possession of the marihuana involved in both counts. Therefore, the verdict of the jury as the sole triers of fact must be sustained.

Fraker v. United States, 294 F.2d 859, 861
(9th Cir. 1961).

Respectfully submitted,

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